# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 177.

PATRICK MORAN, PLAINTIFF IN ERROR,

vs.

JOSEPH HORSKY, Jr.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MONTANA.

FILED DECEMBER 27, 1899.

(17,238.)

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1 In the District Court of the First Judicial District of the State of Montana in and for the County of Lewis and Clarke.

JOSEPH HORSKY, JR., Plaintiff,
*vs.*
PATRICK MORAN, Defendant. } Amended Complaint.

And now comes the plaintiff in the above-entitled cause and by leave of court first had and obtained and files this his amended complaint therein against said defendant, and for cause shows unto this hon. court:

I.

That at the dates hereinafter mentioned he became the owner and possessor of the following-described lots, pieces, or parcels of land situated in the original town site of the city of Helena, in the county of Lewis and Clarke and Territory, now State, of Montana, to wit: Lot twenty (20), in block No. thirty-seven (37), being thirty-seven feet, more or less, on Main street and ninety feet, more or less, deep, and bounded on the south by lot No. nineteen (19), on the north by lot No. twenty-one (21), and on the west by Main street, and on the east by Jackson street, the ownership and possession of which was acquired and obtained on the 17th day of February, A. D. 1875.

2 That on the 7th day of May, A. D. 1874, he also became the owner and possessed of lot No. eighteen (18), in said block, being thirty-one (31) feet, more or less, on Main street and one hundred (100) feet, more or less, deep, bounded on the west by Main street, on the east by said Jackson street, on the north by said lot nineteen (19), and on the south by said lot No. seventeen (17); that on the date last aforesaid he also became the owner and possessed of lot No. nineteen (19), in said block, being thirty-five (35) feet, more or less, on said Main street and one hundred and three (103) feet, more or less, deep, and bounded on the north by said lot No. twenty (20), on the south by said lot No. eighteen (18), on the west by said Main street, and on the east by said Jackson street; that at said last-named date he also became the owner and possessed of a fractional piece of ground, should the same be so regarded, situate between said lots Nos. nineteen (19) and twenty (20), in said block, containing twenty-one (21) and $\frac{5}{10}$ feet, more or less, on said Main street and extending back to said Jackson street; and that also on the 6th day of May, A. D. 1874, the said plaintiff became the owner and possessed of lot No. seventeen (17), in said block, being thirty-four (34) feet, more or less, upon said Main street and one hundred and seven (107) feet, more or less, deep, and bounded on the south by lot No. sixteen (16), on the north by lot No. eighteen (18),

3 on the west by said Main street, and on the east by said Jackson street.

That in truth and reality the said lots owned and possessed

by plaintiff and his predecessors in interest composed one hundred and sixty-one feet fronting on said Main street and running back to said Jackson street, according to the original established and recognized boundaries of said lots; that, according to an accurate measurement thereof, the said lots exceeded the number of feet designated in the deeds therefor by M. F. Truett, then probate judge of the county aforesaid, twenty-one and $\frac{5}{100}$ feet, but that, according to the said lots and boundaries thereof, according to the calls in the deeds from said Truett as such probate judge, no excess whatever existed, and that the title and possession of plaintiff and his predecessors in interest was acquired and obtained accordingly, and on account whereof the said lots, pieces, or parcels of land and the dimensions thereof were governed and controlled by the said boundary lines so established and recognized by plaintiff and his predecessors in interest.

II.

That immediately upon becoming so the owner of the said lots, pieces, or parcels of land, this plaintiff went into the possession of said one hundred and sixty-one feet of ground fronting upon said Main street and running back to said Jackson street, and
4 ever since claiming under him and his tenants and agents have been in possession of the same.

That since and long prior to the said year 1875 said premises have been enclosed by a good and substantial fence and houses erected thereon, and continuously actually occupied and possessed, as aforesaid; that the lots, piece, or parcel of land described in the deed hereinafter mentioned to said defendant and claimed by him is inside of the enclosure of plaintiff and is part and portion thereof, so enclosed since 1874; that said defendant and no other person except those claiming under plaintiff and this plaintiff have been in the seizure or possession of any part of the said one hundred and sixty feet of ground so enclosed, as aforesaid; that for more than five years, continuously and uninterruptedly, prior to the obtaining by defendant of the deed hereinafter mentioned and the institution of this action, this plaintiff and his tenants and those claiming under him have had said premises and that portion thereof so deeded and claimed by plaintiff in actual possession by means of substantial fences and inclosures and the actual occupation and use thereof; all of which has been open, hostile, and notorious, and possession taken under the deeds of the predecessors in interest of this plaintiff.

III.

That on the 20th day of August, A. D. 1873, Robert S. Hamilton, one of the grantors of this plaintiff, being then in the actual
5 possession and occupation of said lots Nos. nineteen (19) and eighteen (18), in the block aforesaid, by inclosures thereof by a substantial fence, according to the established and recognized boundaries thereof, finding that the same by actual measurement exceeded the number of feet called for in the deeds therefor, and for

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the purpose of avoiding trouble or contention concerning the same, duly made his application to the probate judge for entry of the said excess of ground according to actual measurement for the entry of and deed for the said portion of lots nineteen and eighteen (19 & 18) so designated as a fraction, as aforesaid; that the same was done while the said Robert S. Hamilton was so in possession and actual occupation of said lots; that at the time of the said application the said Robert S. Hamilton offered to pay and tendered to said probate judge his fees and the maximum price of said fraction, on account whereof he became and was in equity and good conscience the owner of and entitled to a deed to said premises or fraction if any there be, and all of which was done for the purpose aforesaid and without any intention of abandoning his title according to the established and recognized boundaries of said lots Nos. nineteen and eighteen (19 & 18); that this plaintiff, being the grantee of said Robert S. Hamilton and succeeding to all of his rights and equities in the premises, on the 15th day of December, A. D. 1888,
6 petitioned said probate judge to convey to this plaintiff the said alleged fractional lot so applied for by said Hamilton, and in pursuance of said petition and the application of his grantor, as aforesaid, said probate judge, on the date aforesaid and while plaintiff was so in the possession and occupation of said premises as such grantee, made, executed, and delivered to plaintiff a deed for said premises.

IV.

And plaintiff further shows unto this hon. court that notwithstanding the said ownership and actual possession by him had and held of said lots Nos. 17, 18, 19, and 20, and the alleged fractional portion thereof, the said defendant made his petition and application for a portion thereof so in plaintiff's enclosure, as aforesaid, and by his false and fraudulent representations in reference thereto obtained from said probate judge a deed for a certain lot, piece, or parcel of land so embraced in said enclosure, to wit, said alleged lot No. thirty-one (31), in block thirty-seven (37), of the Helena town site, according to the official survey thereof, approved September 12th, 1885; that said deed is executed in due form of law, and has been ever since its execution and now is of record in the office of the county clerk and recorder of the said county of Lewis and Clarke and State of Montana, and casts a cloud upon the title of plaintiff, greatly to his damage and injury.

7 Wherefore plaintiff prays:

1st. That the said deed so executed by the said probate judge to the said defendant be declared and decreed to be void and of no effect.

2nd. That the right and title, legal and equitable, of this plaintiff in and to the premises aforesaid be adjudged and decreed to be valid.

3rd. That he have such other or further relief as in equity and

good conscience he may seem entitled to, and that he recover his costs and disbursements in this behalf expended.

TOOLE & WALLACE,
*Attorneys for Plaintiff.*

TERRITORY OF MONTANA, }
*County of Lewis and Clarke,* } ss:

Joseph Horsky, Jr., makes oath and says that he is the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge save and except the matters and things therein stated upon information and belief, and as to such matters and things he believes it to be true.

JOSEPH HORSKY, JR.

Subscribed and sworn to before me this 30th day of December, A. D. 1890.

J. MILLER SMITH,
[SEAL.] *Notary Public.*

8 (Title of Court.)

(Title of Cause.)

Now comes the defendant, and for answer to the amended complaint herein on information and belief denies that the several lots mentioned in said amended complaint as lots Nos. seventeen (17), eighteen (18), nineteen (19), twenty (20), and twenty-one (21), in block thirty seven (37), of the original town site of Helena, the ownership of which said lots 17, 18, 19, and 20 is by said amended complaint alleged to be in the plaintiff herein, as the same existed and were platted by and shown upon the original plat of the town site of Helena at the dates, to wit, 1874 and 1875, set forth as the dates upon which plaintiff acquired his title, or for more than ten years thereafter, occupied the same position on the earth's surface as the position of the same-named lots and block did at the date of the commencement of this suit and as they do now occupy; also on information and belief denies that prior to September 12th, 1885, the position of the bounding streets named in said complaint, to wit, Jackson street and Main street, *were*, according to any official survey or plat of the said town site, in the same position on the earth's surface as they have been since September 12th, 1885.

9 Denies the allegation, to wit, that said defendant or any person except those claiming under plaintiff or said plaintiff have since 1874 been in the seizure or possession of any part of the 160 feet "of ground mentioned in said complaint as being enclosed."

Admits that the land occupied by said plaintiff herein had been so occupied by plaintiff for a period of more than five years prior to the commencement of this action; but denies that such occupation, in so far as it relates to lot 31, block 37, was open, hostile, or notorious, or was adverse or could be adverse, and denies that pos-

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session thereof was taken under the deeds of the predecessor in interest of the said plaintiff or in any other manner than in subordination to the legal title of said land, which defendant alleges was and remained in the probate judge, in trust for this defendant and none other, until the 11th day of December, 1888; and denies that said land had ever, prior to said September 12th, 1885, been officially platted, known, and designated as lots seventeen (17), eighteen (18), nineteen (19), and twenty (20), and denies that there was, prior to said September 12th, 1885, any space, lot, piece, or parcel or fraction of land lying or existing between lots nineteen (19) and twenty (20) of block No. thirty-seven (37) or between either two of any of said lots numbered seventeen (17) to twenty-one (21), and on the contrary alleges that prior to the said September 12th,
10 1885, according to the official plat of said town site then existing, the said named lots, to wit, nineteen (19) and twenty (20), were adjoining lots and consisted of no more nor no less than the number of feet frontage as shown on said official plat then existing or then expressed in deeds to the predecessors in interest of said plaintiff.

Denies that in truth or in reality or in any other manner the lots mentioned in said amended complaint as numbers 17, 18, 19, and 20, as being owned by the plaintiff herein, composed or included one hundred and sixty-one feet fronting on Main street and running back to Jackson street, according to the original and established and recognized boundaries, and denies that according to an accurate measurement the said lots exceeded the number of feet designated in the deeds therefor by M. F. Truett, the probate judge of the county aforesaid, twenty-one and $\frac{5}{100}$ feet or any other number of feet.

Admits that according to the calls in said deeds from said Truett, as such probate judge, no excess whatever existed, and admits that the title of plaintiff and his predecessors in interest was acquired and obtained accordingly, but denies that possession was taken accordingly, and denies that on account thereof or on any other account, as a question of law or as a question of fact, the said lots, pieces, or parcels of land or the dimensions thereof were governed or controlled by any acts of plaintiff or his predecessors or by
11 any other thing than the then existing plat and the identical portion of the earth's surface, as shown and delineated thereon and as expressed in the said deeds of which said plat constituted a necessary part, said plat being the original official plat known as the Wheaton plat, which was approved January 7th, 1869, and now on file in the office of the county recorder of Lewis and Clarke county, State of Montana.

Denies that Robert S. Hamilton did, on the 20th day of August, 1873, or at any other time, tender or offer to pay to the probate judge his fees or maximum price for any fraction, for the reason as hereinbefore stated, to wit, that there was no fraction existing under or according to any existing plat or survey; and denies that any such offer or tender for a thing not *in esse* would constitute the said Hamilton or his successors, either in law, equity, or good con

science, or in any other manner, *to be* the owner of or entitle him or them or the plaintiff herein to a deed for any premises at all.

Defendant alleges that at the date of the entry of said town site, March 2, 1869, being the date when the probate judge made entry of said town site in the United States land office at Helena, Montana, in trust for the several use and benefit of the occupants, he, the said defendant, was and for a long time prior thereto had been and for a long time subsequent thereto had remained in the actual *bona fide* and sole occupation, possession, and enjoyment, and re-
12 siding upon a certain tract of land within the town site of Helena, as so entered by said probate judge, and that a portion of the said tract of land so occupied by this defendant was and is the same, and then included and now includes the whole of the identical tract of land described in defendant's deed therefor as lot No. thirty-one (31) of block No. thirty-seven (37) of the town site of Helena, according to the official plat and survey of said town site of Helena, as approved September 12th, 1885.

Alleges that prior to the approval of said official plat, to wit, September 12th, 1885, there was no official plat in existence which showed the land occupied by this defendant at the date of the entry of said town site and as described in defendant's deed therefor in such manner and form as that this defendant could by any possibility make an application therefor as one of the beneficiaries of the trust imposed on the probate judge by reason of the entry and patent from the United States for said town site, and alleges that from and after the approval of said official plat, to wit, September 12th, 1885, until the time when this action was commenced, no notice of the approval of said plat or that said land was and had been platted and surveyed, so that a deed for said lot could be issued, was published or in any other manner given, as required by section 2015 of the Compiled Statutes of Montana; and defendant alleges that prior to said September 12th, 1885, the only plat in existence of said town site was one con-
13 structed by A. C. Wheaton, in 1868, and approved by the county commissioners of Lewis and Clarke county, Montana, January 7, 1869, the same having been constructed and approved prior to the entry of said town site, and which said so-called plat, not having been made in accordance with the actual occupation of claimants, occupants, and owners, represented Main street and Jackson street, being the bounding streets of the land in dispute herein, as running at a different angle to the exterior boundaries of said town site and in a different position on the earth's surface from the position of said streets as governed by actual occupancy, as such occupancy is shown by the said official plat approved September 12, 1885, whereby and by reason whereof the land claimed by plaintiff herein, under the title and description recited in said amended complaint, if anywhere, is not the same land or portion of the earth's surface as that of which the defendant is the owner by reason of his deed dated December 11th, 1888.

Defendant further alleges that at the date of the entry of said town site by the probate judge of said Lewis and Clarke county he,

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the said defendant, had a dwelling-house upon, was living therein, and solely and exclusively occupying the land described in his said deed as lot number thirty-one (31) of block No. thirty-seven
14 (37), according to the said official plat approved September 12th, 1885, and never since has he alienated the title thereto to any person or persons whomsoever, and that he is now the owner and entitled to the possession thereof.

And further alleges that between the date of the entry of said town site until the said 11th day of December, 1888, the title of said lot number thirty-one (31), block thirty-seven (37), being the land in dispute herein, remained in the probate judge of said Lewis and Clarke county under and by virtue of the trust imposed on him by reason of the patent from the United States for said town site.

Defendant admits that on the 15th day of December, 1888, the probate judge of Lewis and Clarke county, Montana, did issue an instrument in writing purporting to be a deed executed in due form of law to the plaintiff herein for lot number thirty-one (31), in block thirty-seven (37), according to the plat and survey approved September 12th, 1885, but denies that said deed was for that portion of the earth's surface described in said amended complaint as being a fraction of or part of the original lots 17, 18, 19, and 20, in block 37, or either of said lots, according to or as the same was delineated on any plat or as shown by any survey existing prior to September 12th, 1885, and which is now or ever was recognized or approved as an official survey or official plat and made under any authority of law, but, on the contrary, alleges that said purported deed
15 is for and purports to convey unto plaintiff herein the said lot number thirty-one, the property of this defendant, and defendant alleges that said deed, issued and executed in due form of law December 15, 1888, unto the plaintiff herein, was wrongfully and unlawfully issued, the title of said lot at that date being and still remaining rightfully and lawfully in this defendant, and the same casts a cloud upon the defendant's title to the said lot number thirty-one (31) of block thirty-seven (37) of said Helena town site.

Defendant denies that by reason of any false or fraudulent statement or representation made to the probate judge or to any other person he obtained a deed for said lot thirty-one (31), but, on the contrary, alleges that all statements, affidavits, and proofs made to said probate judge by this defendant and by his witnesses in making application therefor were truthful and strictly in accordance with facts, and that said deed to this defendant was issued rightfully and lawfully and in strict conformity to the authority conferred by law upon and according to the requirement of the trust imposed upon the said probate judge by act of Congress authorizing the grant of said town site and by the terms of the patent of the United States issued to him for that sole purpose, and denies that the said deed casts a cloud upon the title of plaintiff or of any other person, to his damage or injury, greatly or otherwise.

16 And defendant, for further defense, says that said plaintiff is estopped from claiming that he has held the said lot number thirty-one (31) adversely to this defendant or adversely to the

true legal title, because he says that on the said 15th day of December, 1888, the said plaintiff did apply to and receive from the said probate judge of Lewis and Clarke county aforesaid the deed hereinbefore mentioned for said lot, and ever since has been and still claims to hold the same under and by virtue of said deed.

Wherefore defendant herein prays judgment and decree of this honorable court:

First. That the deed to said plaintiff, dated December 15th, 1888, from the probate judge is unavailable, void, and of no effect.

Second. That the deed to said defendant from the probate judge, dated December 11th, 1888, is valid and in full force, and conveys the title and right of possession unto said defendant.

Third. That the possession of said plaintiff of the premises in dispute herein, to wit, lot No. 31 of block No. 37, Helena town site, was, is, and always has been in subordination to the legal title and not hostile or adverse thereto.

Fourth. That the defendant herein was at the date of his deed for said lot No. 31 of block 37 of said Helena town site and
17 ever since has been entitled to the possession of the said premises as described in said deed.

Fifth. That the plaintiff herein is estopped from denying that the seizure and fee of the land in dispute herein remained in the hands of the said probate judge, in trust for the use and benefit of the occupant at date of entry of said town site, until a survey of said premises had been made and approved and notice thereof given in accordance with law, and that no occupation or possession of plaintiff or his tenants or predecessors in interest could be hostile or adverse to the rights of defendant herein under the terms of the trust imposed by the patent from the United States to the probate judge.

Sixth. That the defendant herein have judgment for the possession of said premises, for the rents, issues, and profits thereof, for his costs of suit in this behalf expended, and for such other and further relief as may be agreeable to equity and good conscience.

CULLEN, SANDERS AND SHELTON AND
COMLY AND FOOTE, *Attorneys for Defendant.*

(Duly verified.)
(Filed January 7th, 1891.)

18 In the District Court of the First Judicial District of the State of Montana in and for the County of Lewis and Clarke.

JOSEPH HORSKY, JR., Plaintiff,
*vs.*
PATRICK MORAN, Defendant.
} Amended Complaint.

And now comes the plaintiff in the above-entitled action and, in pursuance of leave of court heretofore obtained and for the purpose of complying with the decision of the supreme court of the State

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of Montana and the principles of law therein announced and declared, *and* files this his amended complaint herein and alleges:

I.

That for twenty-four years last part himself and his grantors have continuously been in the open, notorious, hostile, and adverse possession and occupation of that certain piece or parcel of land designated and claimed by defendant as lot thirty-one (31), in block thirty-seven (37), in the city of Helena, county of Lewis and Clarke, State of Montana, which entry, possession, and occupation was made, had, and held under claim of title, exclusive of any other right,
19 and under a deed of conveyance therefor, and which said lot, piece, or parcel of land hath been continuously for twenty-four years last past enclosed and protected by a substantial fence and enclosure by said plaintiff and his grantors, on account whereof any claim, right, or title said defendant had or pretended to have in and to said lot, piece, or parcel of land so had, held, possessed, and occupied by plaintiff and his grantors has become and is barred by sections 29, 30, 31, 32, 33, and 34, chap. II, first division, Code of Civil Procedure of the Compiled Statutes of the State of Montana.

II.

That on the 17th day of February, 1874, he became the purchaser and owner of that lot, piece, or parcel of land situate, lying, and being in the city of Helena and county of Lewis and Clarke and State of Montana and designated and known as lot 20, in block 37, of the original town site of the city of Helena, the same being thirty-seven feet, more or less, on Main street and ninety-five feet deep, more or less, and bounded on the south by lot 19, and on the north by lot 21, and on the west by Main street, and on the east by Jackson street; that also on the 7th day of May, 1874, he became the owner and purchaser of lot 18, in block 37, being 31 feet, more or less, on Main street and one hundred feet deep, bounded on the west
20 by said Main street, on the south by lot 17, on the east by said Jackson street, and on the north by lot No. 19; also said lot No. 19, in said block 37, being thirty-five feet, more or less, fronting on Main street and one hundred and three feet deep, and bounded on the north by lot 20, in said block, on the east by Jackson street, on the south by lot No. 18, in said block, and on the west by said Main street; and also on the said 7th day of May, 1874, he became the owner and purchaser of a fractional lot or piece of ground situated between lots 19 and 20, in said block 37, containing two and five-tenths feet, more or less, on Main street and extending back to Jackson street; and also that on the 6th day of May, 1874, he became the purchaser and owner of lot No. 17, in block 37, being thirty-four feet, more or less, on Main street and one hundred and seven feet deep. All of such lots so appeared to be of such width according to the official plats made by M. N. Truett, probate judge, and filed in the county recorder's office of Lewis and Clarke county, Montana Territory; all of which said four lots being entered ac-

cording to the original location and boundary thereof and *was* actually occupied by the grantors and predecessors in interest of this plaintiff, comprising about one hundred and sixty-one feet instead of one hundred and thirty-seven feet as designated by the calls in said deeds and by the said official plat.

21 This plaintiff avers that by reason thereof and the boundaries so defined, as aforesaid, that the lots were governed and controlled by the boundary lines thereof, and not by the number of feet in accordance with the call in said deeds and the said plats; all of which said boundary lines were well established, recognized, and known by the grantors and predecessors in interest of this plaintiff.

III.

That immediately upon becoming so the owner of the aforesaid premises, this plaintiff entered into the actual occupation, possession, and enjoyment thereof, all of which at said dates were respectively enclosed by permanent fences and hath ever since and now are enclosed and occupied by buildings and other improvements thereon by this plaintiff and his tenants (*and that said probate judge obtained a patent for said town site, including the premises in controversy, on the 15th day of June, A. D.* 1872). (N. B.—The foregoing portion of the amended complaint underscored was inserted by interlineation by leave of the court after the cause was argued and set forth in the bill of exceptions.)

IV.

Plaintiff further shows unto this honorable court:

That his grantor, Robert S. Hamilton, being then and at the time owner of and in the actual possession and enjoyment by substantial enclosures of lots 19 and 20, in said block 37, and

22 for the purpose of avoiding any controversy which might arise on account of the dimensions of the property so occupied, possessed, and owned by him by reason of the calls designating the number of feet thereof in said deed, did on the 20th day of August, 1873, duly make his application to the probate judge of the said county for the entry of such portions of the said lots 19 and 20 as exceeded the calls in said deed, to wit, twenty-two feet front on Main street, more or less, and one hundred and three feet deep, and did pay to the probate judge the sum of fourteen dollars, being the amount of his fees and the price of said lot, for the purpose of obtaining and procuring a deed therefor; that he then and there, on account of said application and payment, became the owner of and was entitled to a deed for the said twenty-two feet, more or less, of ground aforesaid, comprising the entire fraction, if any, between the said lots.

V.

That this plaintiff, being the grantee of said Robert S. Hamilton and successor in interest to him and to all his rights and equities in and to said twenty-two feet fraction of said lots in said block, did on the 15th day of December, 1888, petition the probate judge of the

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said county of Lewis and Clarke and Territory of Montana for the conveyance to him of the said fractional lot, piece, or parcel of land
to which his said grantor was entitled, as aforesaid, and that
23 in pursuance of his said petition and application of his said predecessor in interest and the conveyance thereof to this plaintiff the probate judge did on the date aforesaid execute and deliver to this plaintiff a deed therefor.

That no other person or persons whomsoever, except this plaintiff, have been in the possession of the said property for the last fourteen years, nor has any one to the knowledge or information of this plaintiff claimed any right whatever to the same, except as hereinafter stated.

VI.

Plaintiff further shows unto this honorable court:

That the said defendant, Patrick Moran, without any right, title, or claim in law or equity to the said premises, made his application to the said probate judge on the 11 day of December, 1888, for a deed to said premises while so being owned, occupied, and possessed by this plaintiff, and by reason of his false and fraudulent representations in reference thereto obtained and procured from the said probate judge a deed for the said fractional piece or parcel of land so comprising a part of said lots 19 and 20, as hereinbefore set forth.

That the said deed was executed in due form of law and has been recorded in the office of the county recorder of said county, and casts a cloud upon the title of this plaintiff, greatly to his damage and injury.

24 Wherefore plaintiff prays:

1. That the said deed so executed by the probate judge to the said defendant be declared and decreed to be null and void and of no effect.

2. That the right and title, legal and equitable, of the plaintiff in and to the premises aforesaid be adjudged and decreed to be valid.

3. That he have such other or further relief as in equity and good conscience he may seem entitled, and that he recover his costs and disbursements in this behalf expended.

TOOLE AND WALLACE,
*Attorneys for Plaintiff.*

(Verified.)
Filed Sept. 22, 1894.

25 *Answer.*

(Name of Court.)

(Title of Cause.)

The defendant above named for an amended answer herein:

I. Denies that the plaintiff herein is the owner or possessor of the premises described in the amended complaint, or any of them, or any part of them, or that his alleged predecessors in interest were

or could be the owners of any portion of said premises, but admits that he and they have occupied them as alleged in said complaint, but denies that he ever acquired either the ownership or the possession of the said premises or any part of them; and denies that the plaintiff or his predecessors in interest as to any portion of the said premises have been in the seizure of the said premises, or have been seized of the same or any part thereof; and defendant denies that any of the predecessors in interest of the said plaintiff have ever been the owners or have been in possession or have been in the seizure of or have been seized of any portion of the said premises; and denies that defendant's title to any portion of the said premises is barred by any provisions of the Code of Civil Procedure or otherwise.

26 II. And defendant alleges the truth to be with reference to the ownership of the said premises as follows: That on the 2nd day of March, 1869, the probate judge of the county of Lewis and Clarke, State of Montana, made an entry of certain tracts of land in trust for the use and benefit of the occupants thereof under and by virtue of the laws of the United States in reference to the entry of town sites, which said tracts so entered embraces within their exterior limits the mining claim of the defendant hereinafter described.

That, prior to the entry of the said town site by the said probate judge, certain citizens of the United States had, pursuant to the laws of the United States and local laws and customs of miners and pursuant to the rules, regulations, and laws of the mining districts in which the same was situated, located as a placer mining claim certain ground within the exterior limits of the tracts so entered by the said probate judge, embracing within its limits all of the ground claimed by the plaintiff in his complaint herein, and of which he alleges that he is the owner; that the said ground so located contained at the time it was so located and at the time of the said entry and still contains valuable deposits of gold, and that the said locators, in locating the same, marked its boundaries by substantial

27 monuments, so that the said boundaries could be readily traced, which was all that was required by the said laws, regulations, rules, and customs to entitle the said locators to the possession of the same, and, upon the performance thereon of the amount of development work by law required, to a patent to the same from the United States.

That upon the location of the said ground, as aforesaid, the same being then a portion of the unappropriated domain of the United States public land, the said locators went into the possession of the same and began the extraction of gold therein, and so continued in the possession of the same and in the work of extracting the gold therefrom, and so the successors in interest of the said locators continued to do, pursuant to the laws, regulations, and customs and rules, until by mesne conveyances and under and pursuant to the said laws, regulations, rules, and customs the defendant herein, then and at all times since a citizen of the United States, became the owner of the interest of the locators in all of the ground so

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located prior to the time of the entry of the said town site by the said probate judge and still is the owner thereof.

That immediately upon the defendant's so becoming the owner of the said ground and mining claim he went into the possession of the same and began extracting the gold therefrom, and so remained in the possession of the same and continued from then on and until long after the entry of the said town site in the
28 work of extracting the gold therefrom; and the said defendant avers that at the time of the said entry of the said town site he had a valid and subsisting mining claim to all of the ground so located, embracing all of the premises claimed by the plaintiff in his complaint, which said ground was then a mine of gold, by reason whereof the title to the same remained in the United States subject to the right of the defendant herein to acquire patent thereto agreeably to the laws of the United States, and so still remains.

That after the entry of the said town site and prior to the time alleged in the complaint as the time when the said plaintiff became the owner of the premises claimed therein the said defendant left the State of Montana, leaving the said mining claim in the possession of his agent; that during the absence of the said defendant, as he is informed and believes, the said plaintiff, without any right or color of right and without any attempt or intent to acquire title to the said premises or any portion of them under any of the laws of the United States pursuant to which they might be entered, entered upon and has since continued to occupy so much of the said mining claim as he claims in the complaint herein, and in like manner did other parties enter upon the remainder of the said mining claim, who continue to hold and occupy the same and exclude the defendant from the possession of the same, as does the plaintiff herein as to that portion of the said mining claim claimed by him in his complaint herein.

29 And defendant avers that under and pursuant to the laws of the United States and the said rules, regulations, and customs he is required, under penalty of the forfeiture of his rights in the said mining claim to any person relocating the same, and to preserve his rights therein and to enable him to obtain patent therefor, to do certain development work upon said claim; but the said plaintiff and the said other parties holding and occupying the same refuse to permit the plaintiff to enter upon the same for the purpose of doing such work, and that any attempt upon the part of the defendant to enter upon the same for the purpose of doing the said work would subject him to a summary action of forcible entry and to personal violence, though defendant is and always has been desirous of doing such work and acquiring patent to the said mining claim.

III.

And the defendant further avers that on the 11th day of December, 1888, no deed of the same having ever been issued by the probate judge of Lewis and Clarke county, for the purpose of further assuring the title of the defendant thereto, and to enable him to get

into possession of a portion of the said claim in order to prosecute the necessary development work thereon, he applied to the said probate judge for a deed to lot thirty-one (31), in block thirty-seven (37), of the city of Helena, as the same is laid down on the official plat of the city, approved September 12, 1885; that, having made the proofs required, a deed was executed and delivered to him by the said probate judge, but that the said plaintiff refused to recognize his right to the possession of the premises described therein or to allow him to enter into the possession of the same, and defendant denies that he obtained the said deed by reason of any false or fraudulent statement or representation to the said probate judge or to any person, but, on the contrary, alleges that all statements, affidavits, and proofs made to the said probate judge by the defendant herein and by his witnesses in making application therefor were truthful and in accordance with the facts, and defendant avers that at the date of the entry of the said town site by the said probate judge he, the said defendant, had a dwelling-house thereon, was living therein, and solely and exclusively occupying the land described in said deed.

Wherefore defendant prays judgment that the complaint of the plaintiff be dismissed on its merits; that the defendant be decreed to be entitled to the possession of the premises described in the complaint, and that he be put into possession of the same; that plaintiff and all persons claiming under or through him be enjoined from in any manner interfering with the work of extracting any gold therefrom or doing any development work thereon; that defendant have such other and further relief, including judgment for his costs herein, as to the court may seem just.

SANDERS & SANDERS,
GEO. B. FOOTE, AND
T. J. WALSH,
*Defendant's Attorneys.*

(Verified.)
Filed October 4, 1894.

*Motion for Judgment on Pleadings.*

(Name of Court.)

(Title of Cause.)

Now comes the plaintiff in the above-entitled action and moves the court for judgment upon the pleadings herein for the reason:

1. That the answer of the said defendant constitutes no valid defence to the cause of action set up in plaintiff's complaint.

2. For the reason that the said defendant's claim to the premises herein is barred by sections 29, 30, and 33 of the Code of Civil Procedure, Compiled Statutes of the State of Montana.

TOOLE & WALLACE,
*Attorneys for Plaintiff.*

(Filed Oct. 9, 1894.)

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*Amended Motion for Judgment on Pleadings.*

(Name of Court.)

(Title of Cause.)

Now comes the plaintiff in the above-entitled action and files this his amended motion for judgment on the pleadings, and moves the court for judgment herein on the pleadings heretofore filed in this cause, the remittitur from the supreme court therein, and upon the amended complaint and answer filed herein, re-
32 spectively, for the reason that the said answer is sham and frivolous and constitutes no defense to the cause of action set out in the plaintiff's complaint, and for the reason that the same is barred on account of the laches of said defendant as shown by the papers and proceedings aforesaid.

TOOLE & WALLACE,
*Attorneys for Plaintiff.*

(Filed Dec. 22, 1894.)

*Decree of Court.*

(Name of Court.)

(Title of Cause.)

Be it remembered that on the 31st day of December, A. D. 1894, plaintiff's motion for judgment on the pleadings herein coming on to be heard, and the same having been argued by counsel for plaintiff and defendant, and having been duly considered by the court, was on the second day of March, A. D. 1895, sustained, and it was thereupon ordered that the plaintiff have judgment in accordance with the said motion.

Now, therefore, in consideration of the premises, it is ordered, adjudged, and decreed, and the said plaintiff, Joseph Horsky, Jr, is hereby declared and adjudged to be the owner of the premises described in his said complaint and involved in this controversy, and that the said defendant's claim or pretended claim thereto be,
33 and the same hereby is, declared to be void and without right or equity, and that the said deed for said premises from the probate judge of said county, mentioned and described in said complaint, is a cloud upon the title of said plaintiff to said premises, and is embarrassing and injurious to him on that account, and it is therefore ordered, adjudged, and decreed that the said deed be, and the same is hereby, cancelled and made null and void, and that the said title of the said plaintiff to said premises be adjudged and declared to be valid and effectual.

It is further considered and adjudged that the plaintiff recover of the said defendant his costs and disbursements in this behalf expended, taxed herein at the sum of two and $\frac{50}{100}$ dollars.

Done in open court this 19th day of June, A. D. 1895.

HORACE R. BUCK,
*Judge of said Court.*

(Filed June 19, 1895.)

34 *Bill of Exceptions.*

(Name of Court.)

(Title of Cause.)

Be it remembered that among the records and proceedings had and done in the above-entitled action were the following, to wit:

On the — day of ——, 18—, plaintiff filed his complaint in this action, which is in words and figures following, to wit:

(Here insert complaint.)

(The above complaint will be found in the transcript on appeal in this cause heretofore made and filed in the supreme court of the State of Montana, pages 1 to 9, inclusive, by this reference made a part of this transcript.)

That thereafter and on the — day of ——, 18—, defendant filed his answer to said complaint, which is in the words and figures following, to wit:

(Here insert answer.)

(The above answer will be found in the transcript on appeal in this cause heretofore made and filed in the supreme court of the State of Montana, pages 12 to 22, inclusive, by this reference made a part of this transcript.)

That on the — day of ——, 18—, plaintiff filed his replication, which is in words and figures following, to wit:

(Here insert replication.)

35 That upon the issues so framed the said cause came on for trial, and judgment was rendered in favor of the plaintiff on the — day of ——, 18—, from which judgment an appeal was taken and perfected, and on the 5th day of September, 1894, by a decision of the supreme court of the State of Montana, said cause was reversed and remanded, and that thereafter and in accordance with the decision so as aforesaid made said plaintiff filed his amended complaint herein, which is as follows, to wit:

(Here insert amended complaint.)

(Amended complaint hereinbefore set out.)

And thereafter and on the — day of ——, 1894, said defendant filed his amended answer herein, which is in the words and figures following, to wit:

(Here insert amended answer.)

That thereupon and on the — day of ——, 1895, the said plaintiff moved for judgment on the pleadings as thus presented, which

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said motion for judgment is in the words and figures following, to wit:

(Here insert motion for judgment.)

That elaborate arguments and briefs were made in said cause upon the basis that a United States patent had been issued to the probate judge of the said county of Lewis and Clarke, and said cause was submitted upon that theory.

36 While the motion for judgment was under advisement by the court after argument, the court called the attention of counsel to the fact that there was no direct allegation in any of the pleadings to the effect that patent for the town site had been issued to the probate judge of Lewis and Clarke county; thereupon it was agreed between the judge and respective counsel, in open court, that it might be considered that the pleadings so alleged and that the amendment might be made at any time.

And the court, having considered the said questions aforesaid, on the 2nd day of March, 1895, filed its written opinion herein, which is in words and figures as follows, to wit:

(Here insert opinion of court.)

On or about March 28th, 1895, no amendment of the complaint having been made and the defendant being desirous of completing the record, counsel for the defendant, in the presence of counsel for the plaintiff, called the attention of the court to the fact that no amendment had been made, whereupon the counsel for the plaintiff stated that he did not care to make any amendment, as he deemed the complaint sufficiently averred the issuance of a patent to the probate judge, but said counsel had previously notified the judge of the court that he would amend if the judge desired him to. Thereafter counsel for the defendant asked leave to amend his answer.

(Here insert amendment asked for.)

37 The amendment referred to — as follows: And defendant avers that the said plaintiff and each and all of the said persons so entered the said premises and now hold and at all times have held the same under and by virtue of deeds from the probate judge of the county of Lewis and Clarke, issued by the said probate judge of the said county upon his entry and pursuant to the laws of the United States in relation to the preservation and sale of town sites on the public lands, each of which deeds contained the following clause, to wit: "This conveyance is made subject to the *bona fide* rights of miners possessed of mining ground within the limits above named (the premises granted by such deed) on the 26th day of February, 1869."

To this counsel for the plaintiff said he would examine the deeds referred to in the proposed amended answer, and he probably would not oppose the motion; afterwards, however, he signified his dissent, basing it upon the ground that the defendant sought to introduce a

new defense. But no amendment of the complaint having been made meanwhile, the defendant, on the 4th day of April, 1895, filed a motion for a re-argument of the motion for judgment, in answer to which the plaintiff filed the following affidavit, to wit, the affidavit hereto attached marked Exhibit B; that no amendment of the complaint having been made on the 4th day of May, 1895, counsel for the defendant asked the court to fix a day on or
38 before which the plaintiff should amend his complaint, or elect not to — so; whereupon the court fixed Saturday, the 11th day of May, 1895, notifying counsel for plaintiff that the court desired the amendment made pursuant to the stipulation entered into. On said last-mentioned day the plaintiff amended his complaint by interlining the following, to wit: "And that said probate judge obtained a United States patent for said town site, including the premises in controversy, on the 15th day of June, A. D. 1872," the court directing that the amendment be considered as made *nunc pro tunc*, pursuant to agreement. Thereupon the defendant renewed his motion for leave to amend his answer, hereto annexed, marked Exhibit A, previously referred to. This motion of defendant was denied, the court assigning as a reason that the case had been tried upon two different theories already, and to allow the amendment would be virtually to try it a third time. Whereupon the defendant excepted, and now this bill of exceptions is by me, the judge of said court, after notice, settled and allowed, the same being true and correct.

June 4th, 1895.

HORACE R. BUCK, *Judge.*

(Filed June 4th, 1895.)

39 EXHIBIT A.

(Name of Court.)

(Title of Cause.)

(The proposed amended answer is identical with the answer first herein set out, with the addition of the amendment asked to be made by defendant, above set out.)

EXHIBIT B.

(Name of Court.)

(Title of Cause.)

In the Matter of the Application for a Re-argument of the Question Determined by the Court.

STATE OF MONTANA, *County of Lewis and Clarke,* } *ss.:*

Edwin W. Toole, being duly sworn, says that he is one of the attorneys for the plaintiff in the above-entitled action, and has had the exclusive control and management of the same as such attorney;

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that the argument had upon the motion for judgment therein was based upon the theory that the — States patent had issued to the probate judge of the county of Lewis and Clarke for the premises in controversy, and that — allegations of entry in connection with the averments made in the answer were sufficient for the purpose; that the entire argument and briefs in the case were based upon this theory, and that upon the suggestion that possibly it
40 might be better that a direct averment should be made in the complaint showing the date and issuance of the United States patent to said probate judge the said parties took leave to amend—that is to say, the plaintiff took leave to amend his complaint by making said averment by interlineation, and the said defendant took leave to amend his answer by inserting said patent, so that no question would remain as to the present action of the propositions argued and upon which briefs were submitted to the court; that on the 31st ult. Mr. T. J. Walsh, attorney for defendant, was in the office of this affiant, and in talking over the amendments proposed affiant understood said attorney to allude to the proposed amendment he had given to him a few days ago which did not come within the leave heretofore granted, nor had any application whatever thereto, and it was in this connection affiant said that he did not propose to amend, but did suggest that he was willing to make the amendments heretofore granted by the court, but that under no circumstances would he make any such amendments as would allow him to raise the question of the statute of limitations. In connection herewith affiant calls the attention of the court to the proposed amendment above referred to which is marked Exhibit A and is hereto attached and made a part hereof, and affiant further says he is ready and willing to make the amendment so allowed by the court, and desires and will do so at any time in open court under its direction.

EDWIN W. TOOLE.

April 5,1895.

(Jurat.)

41 *Opinion of the Court.*

(Name of Court.)

(Title of Cause.)

*Statement of Facts.*

This court granted a motion filed by plaintiff for judgment on the pleadings as originally filed in this cause July 14, 1891, and in its opinion of that date stated the issues involved as follows:

"The plaintiff Horsky brings this action to quiet title to a fractional piece of ground located on Main street, in the original town site of Helena. The facts admitted by the pleadings are substantially as follows: When the probate judge of Lewis and Clarke county, as trustee for its occupants, made entry of the town site of

Helena on March 2nd, 1869, the defendant Moran resided upon and was in possession of this fractional piece of land. The trustee caused the town site to be platted by one E. C. Wheaton, and the Wheaton plat and survey was the plat with reference to which he issued deeds to the original claimants of town lots. In 1885, under authority of an act of the legislature, a new plat of the original Helena town site was prepared. On the latter plat appears this fraction, designated as lot 31, block 37. The McIntire plat shows the contiguous lots to be Nos. 19 and 20. The fraction does not appear on the Wheaton plat under any specific designation or as a separate parcel of land. If it is shown at all, it is included in lots 19 and 20 of block 37 thereof. The defendant never received or applied for a deed to this fraction, except as hereinafter
42 appears. He allowed possession of it to pass to the plaintiff and his predecessors in interest, who received deeds to lots 19 and 20, block 37, in accordance with the Wheaton plat, in 1874. Ever since 1874 the plaintiff has been in the exclusive and actual possession of this fraction and certain lands which he claims were numbered on the Wheaton plat as lots 17, 18, 19, and 20, contiguous to the same. In 1888 the defendant applied for and obtained a deed to the land in controversy in accordance with the McIntire plat, which, as stated, designated the tract as lot 31, in block 37. The defendant contends that he was one of the beneficiaries for whome the town site of Helena was entered; that this fraction was never shown upon any plat until 1885; that consequently he never was in a position to obtain a deed for it until after that year, and that the deed received by him in 1888 related back to and evidences and confirms his beneficiary title of 1869. He denies in his answer that lots 17, 18, 19, and 20, block 37, referred to in plaintiff's complaint, occupy the same position on the earth's surface as the lots so numbered which had been originally platted by Wheaton.

He avers, also, by his negotiations that the Wheaton plat did not at the time plaintiff's deeds were executed correctly show the geographical location of Main and Jackson streets, which were referred to in said deeds as boundaries. The language of defend-
43 ant's denials in this respect is somewhat vague and ambiguous; but it is inferentially his intention to assert that neither this land in dispute nor the contiguous parcels of which plaintiff is the occupant, claiming the same by virtue of deeds, were ever held by virtue of any valid deeds. To put it more clearly, defendant admits that plaintiff has been an occupant of said lands for the time alleged, but denies that the deeds to him and his predecessor were for identical parcels of land."

An appeal was taken from the judgment rendered on July 14th, 1891, and the supreme court reversed the same, holding that certain issues of fact raised by the pleadings had been ignored.

There is before me now an amended complaint and an amended answer on which plaintiff again moves for judgment. This amended complaint is substantially the one originally filed, but in the amended answer the defendant, conceding the facts claimed by plaintiff to constitute adverse possession and wholly eliminating

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the issues as to the identity of the lot on the earth's surface and the denials which the supreme court construed to raise certain issues of fact, by his averments set forth that he was in possession of a validly located placer claim at the date of the application for and the entry of the Helena town site, and that the deed procured by himself in 1888 was obtained for the purpose of doing the annual assessment work required by law on his placer claim
44 in plaintiff's possession and obtaining the title thereto from the United States Government. He now insists that his title to the lot in controversy springs from his location of land embracing it, as a placer claim, and virtually disclaims any right to the same by reason of the probate judge having entered it with other lots lying within the exterior boundaries of the Helena town site as a trustee for himself as an occupant. The gist of the present controversy is stated in the present opinion.

In this action the defendant Moran contends that the mining claim, located prior to and in his possession at the date of the application for the Helena town site, was absolutely excluded from and that the title thereto did not pass under the United States patent to the probate judge for said town site. If this premise is conceded it necessarily follows that the plaintiff has gained no right by adverse possession to the lot of land in controversy, because the legal title to the same is still vested in the United States Government.

Defendant relies chiefly upon several decisions of the supreme court of Montana when a territory, cases in which (save Thomas *vs.* King) conflicts arose between parties claiming the title to lots in patented town sites and claimants basing their title to the same on patents issued for mining claims located prior to the applications for the town-site patents.
45 He cites Silver Bow M. & M. Co. *vs.* Clark *et al.*, 5 Mont., 378; Talbot *vs.* King, 6 Mont., 76; King *vs.* Thomas, 6 Mont., 409; Butte City Smokehouse Lode Cases, 6 Mont., 397, and certain decisions of the United States Supreme Court on which the Montana cases depend. The decisions of the United States Supreme Court in cases where conflicts have arisen between holders of quartz lode locations or patents and patented placer locations, if applicable, apparently favor defendant's contention of an absolute exclusion.

See—

Mantle *vs.* Noyes (5 Mont., 274), 127 U. S., 348.
Sullivan *vs.* I. S. M. Co., 109 U. S., 550; 143 U. S., 394.
Reynolds *vs.* I. S. M. Co., 116 U. S., 678; 124 U. S., 374.
Iron S. M. Co. *vs.* Campbell, 135 U. S., 286, and
Iron S. M. Co. *vs.* Mike & Starr Co., 143 U. S., 394.

All of these cases save Mantle *vs.* Noyes (an equitable action) were actions in ejectment.

These decisions hold that in a placer patent there are excepted and reserved by the terms of the particular statutes regulating placer claims from the conveyance any vein or lode within the

placer claim known to exist at the date of the application for the patent. Any prior valid quartz location within such area is also excepted.

46 In Mantle *vs.* Noyes, 127 U. S., on page 333, the court, however, places this latter kind of exception on the following ground: "The section (2333, U. S. Rev. Statutes, regulating placer patents) can have no application to lodes or veins within the boundaries of a placer claim which have been previously located under the laws of the United States and are in the possession of the locators or their assigns;" and it declares that such locations have already been disposed of by the Government—citing from Belk *vs.* Meagher, 104 U. S., 279: "A mining claim perfected under the law is property in the highest sense of the term, which may be bought, sold, and conveyed, and will pass by descent."

Whether logical or not, there is a recognized distinction in the doctrine of reservation or exclusion applied to placer patents and the one applied to pre-emption, homestead, and town-site patents. The last three in this respect are classed together.

See Deffenback *vs.* Hawk, 115 U. S., on page 404, and Barden *vs.* N. P. R. R. Co., 154 U. S., on page 322.

These placer quartz patent cases, then, cannot control the present controversy, despite their apparent applicability by logical analogy.

At the time of the issuance of the patent for the original town site of Helena, the general control or supervision of the title

47 to land embraced therein had been entrusted to the officers of the Land Department of the Government. Whether the said land or any portion of it was mineral or non-mineral in character, this was true. The officers of the Land Department allowed the town-site entry, received the purchase price for *for* every portion of land included therein, and a patent was issued for the same. Under these conditions, is the patent void or voidable as to the mining claim located by the defendant?

A patent issued by the Land Department of the United States, as a general rule, transfers the legal title to the land, and has attached to it all presumptions of conclusiveness. It may, however, be absolutely void on its face; and this may be shown when it is considered with reference to the statutes governing it, of which judicial notice is taken, as, for example, when the land described therein has been absolutely reserved from sale or the Government has no title to it or the Land Department officers attempt to convey an unauthorized amount of land.

When so void advantage may be taken of it collaterally in any form of action, legal or otherwise, without extrinsic proof. Such nullity may also appear and be declared from a consideration of extrinsic proof in connection with the law governing it, as, for instance, where in a conflict between two patents for the same

48 tract of land each regular on its face, it is shown that the junior patent is based upon an entry and certificate of final proof and purchase prior in time to the senior patent. Of course, where it readily appears from extrinsic proof, in the light of the law, that the Land Department had no subject-matter on which to

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act, as, for instance, where the proof showed that the land embraced in the patent never belonged to the United States, or that it had been previously granted in a regular patent issued by the officers of said department acting within the scope of their authority in the Land Department, can be shown collaterally even in an a ctin at law is clear. The same principal would apply where a deed on which a grantee relies is shown to be for property never owned by the grantor or previously conveyed by him.

In the case of The United States *vs.* Schurz, 102 U. S., 378 (which rather strangely is cited in Iron Silver Mining Co. *vs.* Campbell, 135 U. S., 301, a placer-quartz contest), a homesteader had received a certificate of final proof and receipt of purchase price paid for his land, and the persons actually contesting his title were town-site claimants. The court used the following language: "We are not prepared to say that if the patent is absolutely void, so that no right could possibly accrue to the plaintiff under it, the suggestion would not be a sound one; but the distinction between a void and
49 a voidable instrument, though sometimes a very nice one, is still a well-recognized distinction on which valuable rights often depend. If a patent should issue for land in the State of Massachusetts, where the Government never had any, it would be absolutely void. If it should issue for land once owned by the Government, but long before sold and conveyed by patent to another who held possession, it might be held void in a court of law on the production of the senior patent. Here the question is whether this land has been withdrawn from the control of the Land Department by certain acts of other persons which include it within the limits of an incorporated town. The whole question is one of disputed law and disputed facts. If they (the land officers) decided erroniously the patent may be voidable, but not absolutely void."

In this case it is true a contest was pending in the land office between the holder of the homestead certificate and the town-site lot claimants, the latter, no doubt, as a matter of fact, being mere trespassers and not in a position to contest under later authorities. See Kemp *vs.* Smelter Co., 104 U. S., 644. It is true, also, that where parties have had a contest over their claims in the Land Department, and one has succeeded in obtaining, virtually as a result of the contest, a patent, the courts either refuse altogether or are very
50 reluctant to go behind the decision of the land office in the premises.

U. S. *vs.* Throckmorton, 98 U. S., 61.
Vance *vs.* Burbank, 101 U. S., 514.
U. S. *vs.* Minor, 114 U. S., 233.
Steele *vs.* Smelting Co., 106 U. S., 447.

But the language I just quoted is clearly applicable in a general way to this question of how a patent may be attacked.

There are certain decisions, however, often cited as holding that even when a patent regular on its face has been issued by officers of the Land Department acting apparently within the scope of their jurisdiction—that is to say, having a general supervision of the title

to the land conveyed—extrinsic evidence may be offered in an action at law to establish as a matter of fact said officers had no authority to issue the patent for the reason that the land had been previously disposed of or reserved from sale.

See Smelting Co. *vs.* Kemp, 104 U. S., 636.
Steel *vs.* Smelting Co., 106 U. S., 447.
And also various decisions in which they are cited.

It is from obscure language used in some of these decisions, mainly the phrase "previously conveyed," that confusion arises as to what constitute such *such* an absence of authority as will authorize a judgment of nullity on collateral attack. The Montana decisions relied upon by defendant indicate this confusion. A careful consideration of the case, however, satisfies me that the obscure expressions from which it results are susceptible of definite
51 interpretation and construction. The general rule, to reiterate, is as follows: "It has always been held that an absolute want of power to issue a patent could be shown in a court of law to defeat a title set up under it, though where it is merely voidable the party may be compelled to resort to a court of equity to have it declared."

Sherman *vs.* Buck, 93 U. S., 216.

In Doolan *vs.* Carr, 125 U. S., 618, an action of ejectment brought by a grantee under a U. S. patent to a railroad company against two persons in possession who had attempted to file declaratory pre-emption statements for the same in the land office, but had not been permitted to do so, the court, on page 624, uses the following language:

"There is no question as to the principle that where the officers of the Government have issued a patent in due form of law, which on its face is sufficient to convey the title to the land described in it, such patent is to be treated as valid in actions at law as distinguished from suits in equity, subject, however, at all times to the inquiry whether such officers had the lawful authority to make a conveyance of the title, but if these officers acted without authority, if the land which they purported to convey had never been within their control or had been withdrawn from that control at the time they undertook to exercise such authority, then their act was void—void for want of power in them to act on the subject-matter of the patent, not merely voidable, in which case, if the circum-
52 stances justified such a decree, a direct proceeding, with proper averments and evidence, would be required to establish that it was voidable, and should therefore be avoided. The distinction is a manifest one, although the circumstances that enter into it are not always easily defined. It is, nevertheless, a clear distinction established by the law and it has been often asserted in this court that even a patent from the Government of the United States, issued with all the forms of the law, may be shown to be void by extrinsic evidence, if it be such evidence as by its nature is capable of showing a want of authority for its issue.

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The decisions of this court on this subject are so full and decisive that a reference to a few of them is all that is necessary. Polk's Lessee *vs.* Wendall, 9 Cranch, 87; New Orleans *vs.* U. S., 10 Peter, 730; Wilcox *vs.* Jackson, dem. McConnell, 13 Pet., 498, 509; Stoddard *vs.* Chambers, 2 How., 284, 317; Eastman *vs.* Salisbury, 21 How., 426, 428; Reichart *vs.* Felps, 6 Wall., 160; East *vs.* Polk, 18 Wall., 112, 117; Leavenworth R. R. *vs.* U. S., 92 U. S., 733; Newhall *vs.* Sanger, 92 U. S., 761; Sherman *vs.* Buick, 93 U. S., 209; Smelting Co. *vs.* Kemp, 104 U. S, 636; Steel *vs.* Smelting Co., 106 U. S., 447; Kan. Pac. R'y Co. *vs.* Dunmeyer, 113 U. S., 629, 642; Reynolds *vs.* I. S. M. Co., 116 U. S., 687."

See also Knight *vs.* U. S. Land Asso., 142 U. S., 161.

I cite the case of Doolan *vs.* Carr because it is sweeping in its announcement of the right to attack a patent collaterally
53 and cites many decisions on the subject, but it appears in this very case that the patent to the railroad company was for lands over which (as appellants contended) at the date of its issuance the Land Department had absolutely no control, as they were *sub judice*. No legal title could have passed under the proof offered, as it tended to show both that the land in controversy had never been embraced in the railroad grant and was not public when included in the patent, and the court seems to have had prominently in view the principle that in an action of ejectment the plaintiff must prevail on the strength of his own title. See page 629 of the opinion. (See also Steel *vs.* Smelting Co., 106 U. S., on page 452, as to this principle controlling in actions of ejectment.)

Chief Justice Waite in his dissenting opinion, on page 636, summarizes his conclusions from a view of the cases, cited by a majority of the court, as follows: "Many more cases of a similar character might be cited, but it is needless to pursue them further. They establish beyond all question that if one holds under an older title, or if he is in possession under a junior claim to represent the title of the Government, he may attack the validity of the patent in a suit at law on the ground that it was issued without proper authority. On the other hand, it seems to me well settled that if he who seeks to contest the patent is a volunteer, a mere intruder, he will not be heard." And he cites numerous authorities sustain-
54 ing this view. The main ground of his dissent was that the defendants being mere intruders, whose pre emption entries had never been received, were not in a position to question the patent.

He quotes also in this dissenting opinion, on page 637, from the language of Chief Justice Marshall in Hoofnagle *vs.* Anderson, 7 Wheat., 212, as follows: "A patent appropriates the land it covers, and that land, being no longer vacant, is no longer subject to location. If the patent has been issued irregularly the Government may provide means for repealing it, but no individual has a right to annul it, to consider the lands still vacant, and appropriate it to himself"—pp. 214, 215. "This seems to me," Judge Waite continues, "to be the true rule; and one way the Government may

adopt to annul a patent which has been issued without authority of law is to grant the land to another, and thus clothe the new grantee with its own power to test the validity of the former proceeding to divest it of title. Such a grantee will thus be made to represent the United States by authority, and he may sue for the land. With such a title, or something equivalent to it, the courts may properly, as has been done heretofore, allow him to assert his own title—that is, the title of the Government against one which was apparently granted before. Such an attack on the title would be direct, not collateral, as authority to proceed had been given by the Government for that purpose."

55 I do not think that Chief Justice Waite states his view of the subject very clearly, but his collation of the authorities is convenient, and the distinction he seeks to establish between mere intruders who attempt to attack a patent collaterally and persons having a direct interest in its impeachment is apparent. In so far as his doctrine as to mere intruders being applicable in actions at law, however, it seems somewhat anomalous. It evidently is a recognition of the application of equitable principles in strictly legal actions.

Equity furnishes ample relief where a patent has been issued to one when another is entitled to it. Where the Land Department through mistake or inadvertence has issued to one a patent for land to which another is entitled, equity will afford relief in a suit instituted by the Government to set aside the patent.

U. S. *vs.* Hughes, 4 Wall., 23.
U. S. *vs.* Minor, 11 U. S., 233.
Chandler *vs.* Calumet & Hecla Min. Co., 149 U. S., on page 93.

Even without the intervention of Government, equity will give appropriate relief as between the contestants themselves where the Land Department by mistake of law or such inadvertence has given to one man land which on the undisputed facts belongs to another.

Moore *vs.* Robbins, 96 U. S., 530.
See also U. S. *vs.* Curtner, 149 U. S., 662.

56 In United States *v.* Stone, 2 Wall., 535, the court uses this language: "A patent is the highest evidence of title and is conclusive against the Government and all claiming under junior patents or titles until it is set aside or annulled by some judicial tribunal. In England this was originally done by *scire facias*, but a bill in chancery is found a more convenient remedy." And then somewhat confusingly continues: "Nor is fraud in the patentee the only ground on which a bill will be sustained. Patents are sometimes issued unadvisedly or by mistake where the officer has no authority in the law to grant them or where another party has a higher equity and should have received the patent. In such cases courts of law will pronounce them void. The patent is but evidence of the grant, and the officer who issues it acts ministerially, and not judicially. If he issues a patent for land reserved from sale by law, such patent is void for want of authority. But one officer of the

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Land Department is not competent to cancel or annul the act of his predecessor. That is a judicial act and requires the judgment of a court."

In this action a bill in equity was filed to cancel certain patents which had been issued for lands previously segregated as a military reservation.

It is at least clear from the opinion that a bill in equity was
57 the proper remedy against these patents, and this would seem to be a recognition that they were only voidable as against the Government until set aside, although the opinion states that they were void *ab initio*. In fact, the rule as to attacking a patent is not at all obscure when applied as between a patentee and the U. S. Government. In the case of The United States *vs.* Hughes, 4 Wall., 232, where land had been patented to Hughes in disregard of the rights of Goodbee, a pre-emptioner who was in possession at the time of the issuance of the patent, had paid the purchase price of the land and held, a receiver's certificate, the court said—page 236: "When this case was here on demurrer (18 U. S., 711) the patent was considered by the court to be a valid instrument, conveying the fee of the United States, and, until annulled, as rendering them incapable of complying with their agreement to Goodbee or his alienees. Whether regarded in that aspect or as a void instrument, issued without authority, it *prima facie* passed the title, and therefore it was the plain duty of the United States to seek to vacate and annul the instrument, to the end that the previous engagement might be fulfilled by the transfer of a clear title, the only one intended for the purchaser by the act of Congress.

"The power of a court of equity, by its decree, to vacate and annul the patent under the circumstances of this case, is undoubted. Relief, when deeds or other instruments are executed by mistake or inadvertence of agents as well as upon false suggestions, is a common head of equity jurisdiction."

58 In the case of U. S. *vs.* Beebe, 127 U. S., 338, is cited the case of U. S. *vs.* Hughes, *supra*, with approval. In the Beebe case, fraud in the procurement was the ground on which patent was sought to be set aside, but it was claimed to be void also on the ground that at the date of the issuance of the patent the United States had no title to the land conveyed. The court denied the relief sought. Curtner *vs.* U. S., 149 U. S., 662, following U. S. *vs.* Beebe in principle and deciding against the U. S., was a case where a bill in equity was filed by the Government to set aside certain lands which by error and inadvertence and mistake on the part of the officers of the Land Department had been listed to the State of California, when, as a fact, they had been previously granted by an act of Congress to a railroad company. The court said: "If that action was wholly void, then it was open to collateral attack, and the railroad company and its grantees could have brought suit to test the legal title at once. Doolan *vs.* Carr, 125 U. S., 618. If that action was not void, but the Interior Department had taken mistaken views of the law or drawn erroneous conclusions from the evidence, and the railroad company and its grantees possessed such

equities as would control the legal title vested in the State and its grantees, the resort could have been had to a court of equity for relief. Smelting Co. *vs.* Kemp, 104 U. S., 636."

59 If, then, even in an equitable proceeding brought directly by the Government to set aside a patent because the lands embraced in it had been previously disposed of, such a patent, in so far as it relates directly to the Government, is not, as a rule, considered as void *ab initio*, surely the court must regard it as having passed the legal title. This doctrine of voidability only as to the Government is incidentally recognized in actions at law.

In Wright *vs.* Roseberry, 121 U. S., ejectment brought by a claimant under a railroad grant against holders of agricultural patents based upon settlements subsequent to the grant, the court says, on page 518: "These patents were evidence that whatever title the United States then held passed to the patentees."

In Richnall *v.* Comstock, 113 U. S., 149, a suit on a covenant of warranty, but as a matter of fact brought for the purpose of establishing the superiority of a title claimed under a State grant, the court said: "It is not necessary to decide whether this patent conveyed a valid title or not. It divested the title of the United States if it had not been divested before. * * *"

This language in Water and Mining Co. *v.* Bugbey, 96 U. S., 165, is also apposite. The court, on page 167, said: "In Sherman *v.* Buick (93 U. S., 209) it was decided that the State of Califor-

60 nia took no title to sections 16 and 36 under the act of 1853 as against an actual settler before the survey claiming the benefit of the pre-emption laws, who perfected his claim by a patent from the United States. * * * As against all the world except the pre-emption settler, the title of the United States passed to the State upon the completion of the surveys, and if the settler failed to assert his claim or to make it good, the rights of the State became absolute."

There is an inconsistency in regarding the patent as voidable only so far as the United States Government is concerned, but as absolutely void *ab initio* in so far as it conflicts with the right of one to whom, in the language of the cases, the land embraced in the patent has been previously disposed.

To illustrate this: In U. S. *v.* Hughes, *supra*, Goodbee, in whose behalf the Government filed the bill in equity to set aside the Hughes patent, was in possession under a certificate of purchase; while in Doolan *v.* Carr, a suit in ejectment, the plaintiff claimed under a patent land in possession of the defendants, who had not even filed pre-emption entries. Chief Justice Waite, in his dissenting opinion in Doolan *v.* Carr, 125 U. S., says: "I feel compelled to withhold my assent to this judgment. The ground of my dissent is not that in a proper case the validity of a patent of the

61 United States for the conveyance of lands may not be attacked in a suit at law by proving that it was issued without the requisite authority, but that this is not a proper case for the application of the rule. To show that I recognize the existence of the right to make such proof, if the person who offers it is in a

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position to do so, it is only necessary to refer to Simmons *v.* Wagner, 101 U. S., 260, where, as the organ of the court, I announced the decision that one in possession under a certificate issued by a proper officer in the regular course of his official duties, showing that he had bought and paid for the land, might successfully defend an action of ejectment brought against him by the holder of a patent issued upon an entry by another party made long after his rights accrued; and this because, after a purchase under which he was in possession, the land was no longer a part of the public domain, and the officers of the United States had no authority to sell it a second time.

In my opinion, however, such proof can only be made by one who holds a right at law or in equity which is prior in time to that of the patentee, or by one who claims under the United States by a subsequent grant or some authorized recognition of title. Unless I have misinterpreted the cases on this subject, that has always been the doctrine of this court."

Judge Hanford, in Stinson Land Co. *v.* Rawson, 62 Fed. Rep., on page 428, says:

"The decisions of the Supreme Court of the United States establish the following propositions: When land has been sold by the United States and the purchase-money paid, it becomes
62 segregated from the body of the public lands, and is no longer the property of the Government, but is the property of the purchaser. Carroll *v.* Safford, 3 How., 460; Witherspoon *v.* Duncan, 4 Wall., 210; Wirth *v.* Branson, 98 U. S., 118; Simmons *v.* Wagner, 101 U. S., 260. After a sale, until the patent is issued, the Government holds the mere legal title in trust for the purchaser; and, in case of a resale, the second purchaser would take the title charged with the trust. Carroll *v.* Safford, *supra*; Lindsay *vs.* Hawes, 2 Black, 554. When the right to a patent becomes perfect, the full equitable title passes to the purchaser with all the benefits, immunities, and burdens of ownership. Benson M. & S. Co. *v.* Alta M. & S. Co., 145 U. S. 428; 12 Sup. Ct., 877. A contract for the purchase of public land is complete when the certificate of entry has been executed and delivered. Witherspoon *v.* Duncan, *supra*. A patent certificate protects the purchaser's rights as fully as a patent. Carroll *v.* Safford, *supra*. A vested right to a patent for public land is equivalent to a patent issued. Stark *v.* Starrs, 6 Wall, 402. The execution and delivery of a patent after the right to it has become complete are ministerial acts of the officers charged with that duty. Simmons *v.* Wagner, *supra*."

Conceding that Judge Hanford and Chief Justice Waite correctly declare the rule, would it not be better legal logic invariably
63 where a *prima facie* holder of the legal title which has been conveyed to him by the officers of the Land Department who exercise a general supervision of the title brings an action in ejectment against the holder of the equitable title in possession to confine the latter to equitable redress?

It may be, then, that too much liberality in expression has been indulged in as to allowing extrinsic evidence to be offered in an

action at law by one in possession to establish a lack of authority on the part of the officers of the Land Department in the issuance of a patent. But if this be true, the language in some of the quartz-placer conflict cases to the contrary notwithstanding, this liberality has been indulged in where there were defendants in possession closely connected with the Government title either legally or equitably. Now, what is the character of the title obtained by defendant to the land in controversy from his mining location? Was the land embraced therein previously disposed of by the Government as far as the town-site patent is concerned?

I am well aware that in several cases, notably Belk *v.* Meagher, 104 U. S., p. 283, and Forbes *v.* Gracey, 94 U. S., 762, that the title conferred by a mining location is spoken of in terms of such high respect as almost to justify the inference that it is on a par with a title by patent or one based on a certificate of final proof and purchase, but surely the court, using this language in cases where vital existing rights or claims of rights were before it, did not intend
64 such inference to be drawn and applied to all cases.

Before the holder of such a claim has made proof of his compliance with the statutory requirements regulating the obtainment of a patent to his location and paid the purchase price therefor, he has only an inchoate right to title at best.

He is under no obligation to make final proof and pay the purchase price so as to entitle him to patent.

Water & Mining Co., 96 U. S., on page 167.

It is well to notice here that there is a clear distinction between the holders of a valid claim whose rights are possessory only and one who, having fulfilled all the conditions required by law, has received or is entitled to a certificate of purchase.

See Sherman *v.* Buick, 93 U. S., 209.
Simmons *v.* Wagner, 101 U. S., 360.
Stimson *v.* Land Co. *v.* Rawson, 62 Fed. Rep., 427.

There is no grant *in presenti* under the mineral laws to the mere locator of a mining claim. "There cannot be a grant unless there is a grantee, and consequently there cannot be a present grant unless there is a present grantee. * * * In other words, when an immediate grant was intended an immediate grantee having all the requisite qualifications was named."

Hall *v.* Russell, 101 U. S., 509.

65 Again, the court, on page 512, says: "Had it been supposed that the title was already in the settler, subject only to defeasance, if the condition subsequent to the grant should not be performed, we cannot but think that provision would have been made for a transfer of the land free from the condition instead of only the settler's rights."

It is true this language is used with reference to settlers under the Oregon donation act, but *mutatis mutandis*, I regard it as applicable.

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In the swamp-land and railroad-grant cases the titles under the acts of Congress are held to be grants *in presenti*.

See Frasher *vs.* O'Connor, 115 U. S., 102.
Wright *vs.* Roseberry, 121 U. S., 488.
Deseret Salt Co. *vs.* Tarpey, 142 U. S., 79.
Chandler *vs.* Calumet & H. M'g Co., 149 U. S., 79.

There is certainly a distinction to be drawn between a title claimed merely by virtue of a valid location without even possession and those claimed under grants *in presenti* or final certificates of proof and purchase. The first as a title is but inchoate in its nature, and, if a grant, is a grant upon conditions precedent.

Of the other two, the titles under the act of Congress held conveyances *in presenti* are grants upon conditions subsequent, and those under certificates of final proof and purchase are placed in the same category with patents.

66 As I have shown, town-site patents are classified with homestead and pre-emption patents as distinguished from placer patents.

The title conferred on defendant by virtue of his mining location was in the nature of an easement only.

Benson Min. Co. *v.* Alta Min. Co., 145 U. S., 43.
See Stinson Land Co. *v.* Rawson, 62 Fed. Rep., 426.

I am satisfied from all the authorities that the United States Supreme Court would regard this patent to the probate judge as only voidable under the facts presented by the pleadings in this case, even in an action at law. The phrase "previously disposed of" should not be construed to include defendant's abandoned easement.

I am strengthened in the conclusion that this patent is voidable only by the cases of Davis *v.* Wiebold, 139 U. S., 528, and N. P. R. R. Co. *v.* Barden, 154 U. S., 288. If they did not expressly decide, as maintained by counsel for plaintiff, that when the officers of the Land Department have issued a town-site patent they must presumably have passed upon the mineral character of the land conveyed, as it was within their jurisdiction to do so, and consequently as there was a precedent question of fact presumptively determined by them, there can be no collateral attack on such a patent, as it is voidable only, not void—at least indicate that the court was inclined to so hold.

67 Nor do I regard the case of Dower *v.* Richards, 151 U. S., 658, as even implicating to the contrary.

It does not appear that any point was made as to the conclusiveness of the town-site patent or that the question was even considered.

This doctrine claimed by counsel for plaintiff to have been enunciated in the Barden case would be a logical result of many utterances of Justice Field, the organ of the court in many previous cases.

He says in Wiebold *v.* Davis, on page 528: "If after the intro-

duction of the town-site patent and the deed to the defendant the objection had been raised to the jurisdiction of the Land Department to issue the patent in question for minerals in lands which have been previously conveyed to the defendant, a much more serious question would have been presented." And on pages 528, 529, he expressly denies that Steel *v.* Smelter Co., 106 U. S., 447, authorized the location of a mining claim within the boundaries of a patented town site.

In both Wiebold *v.* Davis and the Barden case his citation of Kemp *v.* Smelting Co. and Deffenback *v.* Hawke indicate that he even regards them as authorities in favor of the contention of counsel for the plaintiff. And in his dissenting opinion in Iron S. M. Co. *v.* Mike & Starr Co., 148 U. S., 394, on page 416, he says:

68 "The presumption in favor of its validity attends the placer patent as it does all patents of the Government of any interest in the public lands which they purport to convey. So potential and efficacious is such presumption that it has frequently been held by this court that if under any circumstances in the case the patent might have been rightfully issued, it will be presumed as against any collateral attack that such circumstances existed."

Smelting Co. *v.* Kemp, 104 U. S., 636, 646.

The above language is substantially the same that he used in his opinion in the case of Moffit *v.* U. S., 112 U. S., 24.

I believe that if this case were before the Supreme Court of the United States today the judges would hold that in the issuance of a patent for the Helena town site the Land Department presumably decided as a mixed question of law and fact that the defendant Moran did not have a valid mining location within its bounds, and that the case of U. S. *vs.* Schurz, 102 U. S., 378, would be cited as directly in point.

If, then, this patent is not void as to this lot in controversy by reason of the mining claim in the town site at the date of the application and its entry and patent, necessarily the test to be applied is: What standing has defendant in equity as to the conveyance of the town-site patent so far as the lot in controversy is concerned?

In Smelting Co. *v.* Kemp the court says: "If in issuing a patent its officers took mistaken views of the law or drew erroneous conclusions from the evidence or acted from imperfect views of

69 their duty or even from corrupt motives, a court of law can afford no remedy to a party alleging that he is thereby aggrieved. He must resort to a court of equity for relief, and even there his complaint cannot be heard unless he connects himself with the original source of title, so as to be able to aver that his rights are injuriously affected by the existence of the patent, and he must possess such equities as will control the legal title in the patentee's hands. Boggs *v.* Merced Min. Co., 14 Cal., 279, 363. It does not lie in the mouth of a stranger to the title to complain of an act of the Government with respect to it. If the Government is

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dissatisfied it can, on its own account, authorize proceedings to vacate the patent or limit its operation."

Does defendant, by his answer, show himself to be entitled to equitable relief on any of the above grounds? He admits that he has not been in possession of the lot in controversy for some twenty years. Does this sufficiently connect him with the original source of title? Even if he were to prevail upon the U. S. Government to file a bill to set aside this patent as to the lot in controversy, could such a bill be maintained on the facts he pleads? Certainly not, under the rule established in U. S. *v.* San Jacinto Min. Co., 125 U. S., 273; U. S. *v.* Beebe, 127 U. S., 338; and U. S. *v.* Curtner, 149 U. S., 662.

70 The United States is under no obligation whatsoever to reinstate him in the position he occupied as to this mining claim some twenty years ago, and, under the authority of these last-cited cases and numerous others, his self-confessed laches, wholly unexplained, place him beyond the pale of any equitable relief, either directly or indirectly, through the intervention of the Government.

As to the deed obtained from the probate judge, upon which defendant relies, he himself claims that he obtained it for the purpose of assuring the title obtained by his mining location. If this be true, it should be set aside under the view I have expressed, but if he relies upon it as an independent source of title, upon the authority of the previous decision I rendered in this case and the opinion rendered by the supreme court of Montana in reviewing it, Horsky *vs.* Moran, 13 Mont., 250, I must hold it to be null and void.

I do not deem it necessary to decide the point made by counsel for the plaintiff that the defendant having himself accepted a deed from the probate judge to the lot in controversy is not in a position to question that trustee's title, but I am inclined to think he is right.

The plaintiff's motion for judgment on the pleadings is granted.

HORACE R. BUCK, *Judge.*

March 2nd, 1895.

71 *Notice of Appeal.*

(Name of Court.)

(Title of Cause.)

Take notice that the defendant above named hereby appeals to the supreme court of the State of Montana from the judgment of the district court of the first judicial district of the State of Montana in and for the county of Lewis and Clarke, in the above-entitled action, on the 10th day of June, 1895, made and entered in favor of the plaintiff and against the defendant, quieting the title of the plaintiff

to the premises described in the complaint and for costs to the said plaintiff.

T. J. WALSH,
*Defendant's Attorney.*

To Messrs. Toole & Wallace, plaintiff's attorneys.

Due personal service of the foregoing notice this 25th day of July, 1895, hereby admitted.

TOOLE & WALLACE,
*Plaintiff's Attorneys.*

(Filed July 26, 1895.)

72 (Name of Court.)

(Title of Cause.)

*Undertaking on Appeal.*

Whereas the defendant in the above-entitled action is about to appeal to the supreme court of the State of Montana from a judgment and decree entered against him in said action in the district court of the first judicial district of the State of Montana in and for the county of Lewis and Clarke, on the 19th day of June, 1895, quieting the title of the said plaintiff to the premises described in the complaint and in controversy in this action, and for his costs:

Now, therefore, in consideration of the premises and of such appeal, we, the undersigned, of the said county and State, do hereby jointly and severally undertake and promise on the part of the said defendant and appellant that he, the said defendant and appellant, will pay all damages and costs which may be awarded against him on the appeal or on a dismissal thereof, not exceeding three hundred dollars, to which amount we acknowledge ourselves jointly and severally bound.

MOSES FURLONG.
W. A. RUMSEY.

Justification.

73 STATE OF MONTANA, } ss:
*County of Lewis and Clarke,* }

I, John Bean, clerk of the district court of the first judicial district of the State of Montana in and for the county of Lewis and Clarke, do hereby certify that the foregoing transcript contains a full, true, correct, and compared copy of the original amended complaint, amended answer, motion for judgment, motion for judgment as amended, judgment, bill of exceptions, amendment asked by defendant, opinion of court, notice of appeal, and undertaking on appeal in the cause of Horsky *vs.* Moran, as appears from the records in my office.

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Witness my hand and the seal of the said court this 10th day of September, 1895.

[SEAL.]

JOHN BEAN, *Clerk*,
By JESS C. RICKER, *Deputy*.

Transcript filed in supreme court September 11, 1895.

74 In the Supreme Court of the State of Montana.

JOSEPH HORSKY, JR., Respondent,
*vs.*
PATRICK MORAN, Appellant.

It is hereby stipulated that the pleadings contained in the transcript heretofore filed in this court shall be considered as a part of the transcript in this court upon the present appeal, in which was filed in this court a transcript on the 11th day of September, 1895.

October 1st, 1895.

EDWIN W. TOOLE,
*Attorneys for Respondent.*
T. J. WALSH,
*Attorney for Appellant.*

Stipulation filed in supreme court December 2, 1898.

75 *Order.*

JULY 25TH, 1898.

JOSEPH HORSKY, JR., Respondent,
*vs.*
PATRICK MORAN, Appellant.
Case No. 813.

This cause this day came on for the judgment and decision of the court on appeal; whereupon, on consideration, it is now here ordered and adjudged that the judgment of the court below, made and entered on the 10th day of June, A. D. 1895, be, and the same is hereby, affirmed with costs.

Opinion by Hunt, A. J.; Pigott, A. J., concurring.

*Order.*

AUGUST 1ST, 1898.

(Title of Cause.)

Appellant's motion to stay remittitur herein is granted until October 1st, A. D. 1898.

76 (Supreme Court of Montana, July 25, 1898.)

JOSEPH HORSKY, JR., Respondent,
*vs.*
PATRICK MORAN, Appellant.

*Opinion of Court.*

Action to quiet title.

Opinion of the court by HUNT, *J.*:

The pleadings show substantially the facts to be as follows: That when the probate judge of Lewis and Clarke county, as trustee for the occupants of the town site of Helena, made the entry of the town site on March 2, 1869, the defendant and appellant Moran resided upon and was in possession of certain fractional parts of ground located on Main street, in the original town site of the city of Helena. The town site was platted and deeds issued to the original claimants of town lots, and in 1874 plaintiff and his predecessors in interest received deeds to the aforesaid lots in controversy from the probate judge. Plaintiff ever since 1874 has been in the exclusive and actual possession of the property sued for. In 1888 the defendant applied for and obtained a deed from the probate judge to the land in dispute.

The defendant concedes the facts claimed by the plaintiff to constitute adverse possession, but sets up that he was in posses-
77 sion of a validly located placer claim at the date of the application for and the entry of the Helena town site, and that the deed procured by him in 1888 was obtained for the purpose of further assuring his title to the property and to enable him to get into possession in order to prosecute the necessary development work on his mining claim, but that the plaintiff refused to recognize his right to the possession of the premises described in the deed or to allow him to enter into possession of the same. His position is that his title to the lots in controversy springs from his location of the land, embracing them as a placer claim. He makes no claim of right by reason of the probate judge having entered the lots, with other lots lying within the exterior boundaries of the Helena town site, as a trustee for himself as an occupant, but relies upon the contention that the mining claim located prior to and in his possession at the date of the application for the Helena town site was absolutely excluded from and that the title thereto did not pass under the United States patent to the probate judge for said town site—that is to say, he stands upon the proposition that the plaintiff Horsky acquired no rights by adverse possession to the lots in question, because the legal title to the same is still vested in the United States.

After the entry of the town site and prior to the time when
78 the plaintiff became the owner of the premises claimed therein, the defendant left the State of Montana, leaving his

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mining claim in the possession of his agent; and he avers that during his absence, as he is informed and believes, plaintiff, without right, entered upon and has since continued to occupy those portions of the mining claim described in the complaint, and that in like manner other parties entered upon other portions and continued to hold and occupy the same and excluded the defendant from the possession thereof. He further set up that under the laws of the United States and the rules governing mining claims he is required, so as to enable him to obtain a patent, to do certain development work, but that the plaintiff refused to permit him to enter upon the premises for the purpose of doing such work, and that any attempt upon his part to enter to do the work would subject him to a summary action and to personal violence, though defendant is and always has been desirous of doing such work and acquiring patent to the mining claim. Defendant's prayer is that the plaintiff be dismissed, and that he (defendant) be decreed to be entitled to the possession of the premises described in the complaint, and that an injunction issue preventing plaintiff from interfering with his work of mining the property involved.

The plaintiff moved for a judgment on the pleadings because the answer stated no defense and was sham and frivolous, and the cause of action was barred on account of laches of the defendant,
79 as shown by the papers and proceedings. The district court granted the motion and rendered judgment in plaintiff's favor, declaring defendant's claim or pretended claim to be void and without right or equity and ordering that the deed of the probate judge to defendant be canceled and made null and void. Defendant appeals.

The record contains the opinion of the district court. It is an elaborate review of the decisions of the Supreme Court of the United States bearing upon the questions involved, and proceeds upon a recognition of the distinctions drawn by the decisions of that court between the reservation or exclusion in and from a placer patent and the doctrine of reservation or exclusion from a town site, homestead, or pre-emption patent. After careful examination of the authorities cited and many more, we have concluded to adopt the opinion of the trial court as expressive of the unanimous views we hold upon the status of this defendant, who assails the possession and claim of title of the plaintiff, and asks affirmative relief, but who shows that he wholly neglected to assert and protect any rights he ever had as the possessor of a valid mining claim when the town-site patent was applied for, and offers no excuse for his inaction during the period of nearly twenty years after plaintiff entered upon and occupied the lots before he brought this suit, except that plaintiff refused to allow him to enter upon the premises. By
80 his answer he shows that he has long since disconnected himself from the United States Government, stands in no privity with it, and possesses no claim, legal or equitable, to the lots which plaintiff has openly, notoriously, and continuously occupied for over twenty years. Defendant is without any title or claim of title at all. He is in the attitude of an intruder, and it does not lie in

his mouth to be heard to assail the plaintiff's position (Bohall *v.* Dilla, 114 U. S., 50). The pleadings therefore make the case a proper one to apply the doctrine of laches, well stated by Justice Brewer in Naddo *v.* Bardon, 4 C. C. A., 642, as follows: "No doctrine is so wholesome, when wisely administered, as that of laches. It prevents the resurrection of stale titles and forbids the spying out from the records of ancient and abandoned rights. It requires of every owner that he take care of his property, and of every claimant that he make known his claims. It gives to the actual and long possessor security and induces and justifies him in all efforts to improve and make valuable the property he holds. It is a doctrine received with favor, because its proper application works out justice and equity, and often bars the holder of a mere technical right, which he has abandoned for years, from enforcing it when its enforcement will work large injury to many."

Although we put our affirmance of the judgment upon the ground of laches, a majority of the court believe that the
81 decision and reasoning of the trial court is the correct solution of the other questions discussed. Judge Buck's opinion is as follows:

(Here follows Judge Buck's opinion as given in Transcript, pages 41 to 70, inclusive.)

The judgment is affirmed. Affirmed.

WM. H. HUNT,
*Associate Justice.*

I concur in the judgment of affirmance upon the ground that the answer discloses no privity of defendant with the United States.

WM. T. PIGOTT,
*Associate Justice.*

82 In the Supreme Court of the State of Montana.

JOSEPH HORSKY, JR., Defendant in Error,
*vs.*
PATRICK MORAN, Plaintiff in Error.

*Petition for Writ of Error.*

To the Hon. W. Y. Pemberton, chief justice of the supreme court of the State of Montana:

Now comes your petitioner, Patrick Moran, by T. J. Walsh, his attorney, and respectfully represents that in the above-entitled cause, which is not a personal action, but one relating to realty, there was drawn in question the construction of the statutes of the United States, to wit, the construction of section 3392 of the Revised Statutes of the United States, and other sections of chapter VIII of title XXII of the Revised Statutes of the United States, concerning the "reservation and sale of town sites on the public lands," as well as certain sections of chapter VI of the said Revised Statutes, entitled "Mineral lands and mining resources."

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83 And your petitioner further represents that in said cause, as appears by the pleadings and the record, he claims title to the realty in controversy under the provisions of the laws of the United States hereinbefore referred to, and claims that under the provisions of the same laws of the United States the above-named defendant in error has no title to the said premises, and that the decision of the supreme court of the State of Montana in the said cause is against the right and title so, as aforesaid, set up and claimed by your petitioner under the said laws, which were so construed, contrary to the contention of your petitioner, by the supreme court of the State of Montana as that the said court adjudged that the said defendant in error was the owner of the said premises, and that your petitioner had no right or title thereto.

And your petitioner further respectfully represents that in the records and proceedings, and also in the rendition of the said judgment in the above-entitled cause, which is in the supreme court, before you, a manifest error hath happened in the matters and things in your petitioner's assignment of error herein more specifically set forth, to the great injury and damage of your petitioner.

Wherefore your petitioner prays that it may please your
84 honor to grant unto your petitioner a writ of error to remove the said cause and the record thereof into the Supreme Court of the United States, to the end that the error, if any hath happened, may be duly corrected and full and speedy justice done your petitioner.

And your petitioner, as in duty bound, will ever pray.

T. J. WALSH,
*Attorney for Plaintiff in Error.*

Let the writ of error issue as above prayed for upon the petitioner filing with the clerk of this court a good and sufficient bond, conditioned to prosecute such writ and answer all costs, in the sum of $500, said bond to be approved by the clerk of said court.

W. Y. PEMBERTON,
*Chief Justice of the Supreme Court of the State of Montana.*

Service of the foregoing petition and order and receipt of a copy of same acknowledged this 24th day of October, A. D. 1898.

EDWIN W. TOOLE,
*Attorney for Defendant in Error.*

Filed in supreme court Oct. 8th, 1898.

85 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the supreme court of the State of Montana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the

State of Montana, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Joseph Horsky, Jr., defendant in error, and Patrick Moran, plaintiff in error, wherein was drawn in question the validity of a statute or treaty of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or
86 commission, a manifest error hath happened, to the great damage of the said Patrick Moran, plaintiff in error, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in Washington, in the said Supreme Court, within sixty days from the date hereof, that, the record and proceedings aforesaid be- inspected, that said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, this 8th day of October, A. D. 1898.

[SEAL.] GEO. W. SPROULE, *Clerk.*

The above writ of error is hereby allowed by—

W. Y. PEMBERTON,
*Chief Justice of the Supreme Court of the State of Montana.*

87 Copy of the foregoing writ of error served this — day of October, 1898.

EDWIN W. TOOLE,
*Attorney for Defendant in Error.*

Due service of the above writ of error this 8th day of October, 1898, and a copy left with me at the same time, is hereby admitted.

BENJAMIN WEBSTER,
*Clerk of the Supreme Court of the State of Montana,*
By WM. H. CURTIS, *Deputy Clerk.*

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88 UNITED STATES OF AMERICA, *ss*:

To Joseph Horsky, Jr., defendant in error, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within sixty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Montana, wherein Joseph Horsky, Jr., is defendant in error and Patrick Moran is plaintiff in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the party on that behalf.

Witness the Honorable William Y. Pemberton, chief justice of the supreme court of the State of Montana, this 8th day of October, in the year of our Lord one thousand eight hundred and ninety-eight.

W. Y. PEMBERTON,
*Chief Justice of the Supreme Court of the State of Montana.*

Signed and allowed by the chief justice this 8th day of October, A. D. 1898.

BENJAMIN WEBSTER,
*Clerk of the Supreme Court of the State of Montana.*

Due and lawful service of a copy of the foregoing citation and of the writ of error mentioned therein accepted and acknowledged at Lewis and Clarke county, State of Montana, this — day of October, A. D. 1898.

EDWIN W. TOOLE,
*Attorney for Defendant in Error.*

Filed in supreme court October 8th, 1898.

89 In the Supreme Court of the State of Montana.

JOSEPH HORSKY, JR., Defendant in Error,
*vs.*
PATRICK MORAN, Plaintiff in Error.

Know all men by these presents that we, Patrick Moran, as principal, and Moses Furlong and W. A. Rumsey, as sureties, are held and firmly bound unto the defendant in error, Joseph Horsky, Jr., in the sum of five hundred dollars ($500); for the payment of which, well and truly to be made, we bind ourselves and each of our heirs, executors, administrators, and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 8th day of October, 1898.

Whereas the above-named Patrick Moran has obtained a writ of error and citation directed to said Joseph Horsky, Jr., citing and admonishing him to be present and appear within sixty days after the service of the writ of error and to show cause, if any there be, whether the judgment rendered in the above-entitled action by the

supreme court of the State of Montana on the 25th day of July, 1898, should not be reversed:

90 Now, therefore, the condition of this obligation is such that if the said Patrick Moran shall prosecute said writ of error to effect and answer all costs if he shall fail to make his plea good, then this obligation to be null and void; otherwise to remain in full force and effect.

PATRICK MORAN. [SEAL.]
MOSES FURLONG. [SEAL.]
W. A. RUMSEY. [SEAL.]

Signed, sealed, and delivered in the presence of—
T. J. WALSH.

STATE OF MONTANA,
*County of Lewis and Clarke,* } ss:

Moses Furlong and W. A. Rumsey, whose names are subscribed as sureties to the above undertaking, being severally duly sworn, each for himself says that he is worth the sum in the said undertaking specified as the penalty thereof, over and above all his just debts and liabilities, exclusive of property exempt by law from execution.

MOSES FURLONG.
W. A. RUMSEY.

Subscribed and sworn to before me this 8th day of October, 1898.

T. J. WALSH,
[SEAL.] *Notary Public in and for Lewis and Clarke County, State of Montana.*

91 Approved this 10th day of October, 1898.

W. Y. PEMBERTON,
*Chief Justice of the Supreme Court of the State of Montana.*

Attested as to approval by and approved by—
BENJAMIN WEBSTER,
*Clerk of the Supreme Court of the State of Montana.*

Filed in supreme court Oct. 10, 1898.

92 In the Supreme Court of the State of Montana.

JOSEPH HORSKY, Defendant in Error,
*vs.*
PATRICK MORAN, Plaintiff in Error.

*Assignment of Error.*

Comes now Patrick Moran, plaintiff in error, by T. J. Walsh, his attorney, and says that the record and proceedings in the above-entitled cause show there is manifest error in this, to wit:

1. The supreme court of the State of Montana erred in holding

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that the district court properly granted the motion of defendant in error for judgment on the pleadings.

2. The said court erred in holding that the answer of the plaintiff in error constituted no defense to the complaint of the defendant in error.

3. The said court erred in holding that the judgment of the district court was right, and in affirming the same.

4. The said court erred in holding that the defendant in error could acquire any rights by adverse possession or under the statute of limitations to the ground in controversy, which the plain-
93 tiff in error held, owned, and occupied as a mining claim at the time of the entry of the Helena town site by the probate judge of Lewis and Clarke county.

5. The said court erred in holding that the defendant in error could acquire any title to the premises in controversy through deeds from the probate judge of the said county, to whom was issued a patent for certain lands embracing within its exterior boundaries the premises in controversy in this action, under the provisions of the laws of the United States concerning the "Reservation and sale of town sites on the public lands," for that the premises in controversy constitute and constituted part of a mining claim owned and occupied by the plaintiff in error at the time of the entry of the Helena town site by the probate judge of Lewis and Clarke county.

6. The said court erred in holding that any failure to assert his rights on the part of the plaintiff in error would give any title to the premises in controversy to the defendant in error, for that the premises referred to being a part of a mining claim owned and held by him at the time of the entry of the town site, the title to the same is either in the United States or in the plaintiff in error.

7. The said court erred in holding that the patent to the probate judge of Lewis and Clarke county had conveyed to him all lands within its boundaries, including valuable mining claim or possession.

94 8. The said court erred in holding that the plaintiff in error lost his rights to his mining claim by not asserting them at the time of the issuance of the town-site patent, and in holding that the issuance of the town-site patent was an adjudication by the Land Department of the Government that there existed no valuable mining claims or possessions within the boundaries of said patent.

9. The said court erred in holding that in order to permit the plaintiff in error to deny the title of the defendant in error to the premises in controversy upon the ground that the title to the same never passed from the Government of the United States to the probate judge of Lewis and Clarke county, he, the plaintiff in error, must connect himself with the Government of the United States or stand in privity with it.

10. The said court erred in holding that the plaintiff in error ever did disconnect himself from the United States Government.

11. The said court erred in holding that the plaintiff in error occupied the attitude of an intruder.

12. The said court erred in holding that the plaintiff in error ever abandoned his mining claim or that he ever lost his right to resume work thereon pursuant to the provisions of section 2324 of the Revised Statutes of the United States.

95 13. The said court erred in holding that the mining claim of the plaintiff in error, located and owned by him and in his possession and occupancy at the date of the application of the probate judge for a patent for the Helena town site, was not absolutely excluded therefrom, and that the title thereto passed from the United States Government to the probate judge by the patent.

Wherefore the said plaintiff in error prays that the said judgment of the said supreme court of the State of Montana be reversed, and that the said court be directed to enter an order reversing the judgment herein.

T. J. WALSH,
*Attorney for Plaintiff in Error.*

Filed in supreme court Oct. 8th, 1898.

96 STATE OF MONTANA, } ss:
*Office of the Clerk of the Supreme Court,* }

I, Benjamin Webster, clerk of the supreme court of the State of Montana, do hereby certify that the foregoing is a true copy of the records in the case of Joseph Horsky, Jr., *vs.* Patrick Moran, including the transcript filed in this court, together with the complaint and answer found in the transcript filed upon the former appeal and by stipulation made a part of the transcript first above referred to, and of the judgment of this court and the opinion of the court filed herein; also of the assignment of errors herein filed by the plaintiff in error; all of which is hereby certified and transmitted to the Supreme Court of the United States in obedience to the writ of error filed herein, of which a true copy is also contained in the foregoing record, together with a petition for the said writ, the order for its issue, and the undertaking for costs, filed by the plaintiff in error as the same, and all of the same appear from the records in my office.

Witness my hand and the seal of the said court this 30th day of November, 1898.

[Seal Supreme Court, State of Montana.]

BENJAMIN WEBSTER,
*Clerk of the Supreme Court of the State of Montana.*

Endorsed on cover: File No., 17,238. Montana supreme court. Term No., 177. Patrick Moran, plaintiff in error, *vs.* Joseph Horsky, Jr. Filed December 27th, 1898.

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